

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 62 OF 2017

(Arising from the decision of the Ilala District Court at Samora Avenue in Civil Appeal No. 61 of 2016. Originating from the decision of Ukonga Primary Court in Matrimonial Cause No. 18 of 2016)

SAID ABDALLAH.....APPELLANT

Versus

PILI JUMANNE NDALUYA.....RESPONDENT

JUDGMENT

B.R. MUTUNGI, J:

This is a second appeal. Originally at the Ukonga Primary Court in Matrimonial Cause No. 18 of 2016, the respondent successfully petitioned for divorce against the appellant. The trial court subsequently proceeded to divide between the parties the matrimonial properties dully

acquired by the conflicting parties. The appellant was aggrieved, he thereafter preferred to appeal to the District Court of Ilala at Samora in Civil Appeal No. 61 of 2016. The decision of the trial court was upheld and the appeal was subsequently dismissed with costs.

The appellant is still dissatisfied with the decision of the first appellate court, hence has come herein on a second bite. In the instant appeal, the appellant has raised four (4) grounds of appeal which are as hereunder;

- 1. That the trial Magistrate erred in law to uphold the decision of the primary court while there was no sufficient evidence on existence of the marriage.*
- 2. That the trial magistrate erred in law and facts to uphold the decision of the primary court while there was no sufficient evidence that the marriage is irreparably broken.*
- 3. The magistrate erred in law to uphold the decision of the primary court that the marriage is*

irreparably broken without proof of failure certificate from the Board.

- 4. That the magistrate erred in law to uphold the decision of the primary court on the sale of matrimonial properties while there was no evidence on contribution of the respondent to the acquisition or improvement of those properties.*

The events leading to this appeal are as follows; the respondent at the trial court alleged to have contracted an Islamic marriage with the appellant in 2012. She further alleged that, during their marriage, they were blessed with two (2) issues. The respondent had proceeded to file the petition for the divorce since the appellant had issued her a “talak”.

Regarding the properties alleged to be matrimonial assets, the respondent's position was that, they had jointly built one house and bought one motor cycle. Further she did allege they had one shop located at Chanika. Hence

the respondent prayed for the division of the said properties and a granted of Tshs. 80,000/= or 100,000/= as costs for the maintenances of the said children.

On the other side of the coin, the appellant's version of the story was to the effect, the respondent was not his wife, though he admitted to have been his concubine. The appellant alleged further he did not issue her with "a talak". According to him, the problem arose after he had refused to allocate a piece of land to the respondent and a house for the children. The appellant was of the view, the respondent's intention was to enjoy the alleged properties which she did not contribute at all in its acquisition.

At the end of the hearing, the trial court upon granting the divorce, ordered the said house be sold and the respondent be given 40% of the proceeds. The court further did order the respondent be given 30% of the value of the

said shop. The said motor cycle be given to the appellant. The appellant was further ordered to give the respondent Tshs. 80,000/= per month for the maintenance of the children.

At the hearing, the appeal was agreed to be argued by way of written submissions. Both parties did file their respective written submissions within the schedule as ordered.

Regarding the first ground of appeal, the appellant insisted there was no prove to confirm whether the appellant and the respondent had entered into a marriage. He further submitted the alleged “talak” did not bare his signature to prove its genuineness. More so, he lamented there was no proof as to whether there had been a ceremony to that effect. He referred this court to **section 30 (1) of the Law of Marriage Act [Cap. 29 R.E 2002] and the**

case of Zacharia Lugendo Versus Shedrack Lumilang'omba
[1987] T.L.R 32

In reply, the respondent supported the findings of the first appellate court. She was of the view that, the mere fact there was a talak issued by the appellant, obviously there was a valid marriage between them which was contracted under Islamic perspective in terms of section **107 (3) of the Law of Marriage Act (supra)**

The respondent further submitted there was evidence to indicate their marriage dispute was not resolved in the BAKWATA conciliation board.

In rejoinder, basically the appellant reiterated on what he had submitted in his submission in chief.

Before I venture into the merits of the appeal, as I have pointed earlier this is the second appeal obviously the law is

well settled at what stage the court is entitled to interfere with the concurrent findings of the lower two courts. In view thereof, this court is entitled to interfere with the concurrent findings of the two lower courts only if there has been a misapprehension of the evidence, miscarriage of justice or a violation of some principle of law or practice. The said position was also amplified in the case of **Amratlal D.M t/a Zanzibar Silk Stores Versus A.H Jariwale t/a Zanzibar Hotel [1980] T.L.R 3**

Having in mind the above legal position, I now turn to the merits of the first ground of appeal, whether there was existed marriage between the parties herein or otherwise. I have gone through the entire court records I totally agree with the first appellate court's findings. The evidence is very clear that, there was a valid existing marriage between the parties herein. The reason being that, the testimony of the

respondent indicated they had entered into a muslim marriage. There is no documentary proof of a marriage certificate tendered at the trial court but the respondent had tendered Form No. 3 with reference No. 00179/2016 dated 11/4/2016 to confirm that the two were legally married. Further, the appellant had committed himself by issuing a "Talak".

For the foregoing reason, I find the first ground of appeal has no merits.

Turning to the second ground of appeal on whether the marriage was irreparable broken. The appellant in his written submission argued, there was no evidence to that effect. He referred the court to the case of **Bibie Mauridi Versus Mohamed Ibrahimu [1989] T.L.R 162** and **section 108 (a) and (d) of the Law of Marriage Act (supra)**

In reply, the respondent submitted the said marriage had irreparably broken down since BAKWATA had failed to resolve the dispute.

In line with the above findings of the first ground of appeal, I have no reasons to fault the finding of the first appellate court. There is clear evidence from the court record that the dispute between the parties herein had been referred to BAKWATA. However, the same was not resolved amicably. This is evidenced from the certificate from BAKWATA dated 11/4/2016. The evidence adduced in the trial court was also to the same effect.

For that reason, I find the second ground of appeal has no merits. Consequently, I hereby dismiss it.

Coming to the third ground of appeal where the appellant laments there was no certificate from the Conciliation Board to prove their marriage had irreparably

broken down. The appellant was of the view the trial court had no jurisdiction to entertain the matter as per sections 101 and 103 (2) (a) of the Law of Marriage Act. He further argued the purported conciliation board had no jurisdiction since the parties had been living in Chanika which is within Ilala District whereas the dispute was referred to the Tembeke District Office.

The respondent submitted that, the mere fact the issue of jurisdiction comes up, under **section 103 (2) of the Law of Marriage Act** the same cannot be nullified.

In my settled view the evidence from the court record reveals there is a Marriage Conciliation Board Certificate from BAKWATA as pointed in my finding on the second ground of appeal. Furthermore, I find the allegation that the BAKWATA Conciliation board had no jurisdiction as

propounded by the appellant has no merits. This is because **section 104 (7) of the Law of Marriage Act** states as follows;

'the proceedings of a Board shall not be invalid by reason only of the fact that it did not have jurisdiction under subsection (2) of section 103.'

In the event, I find the third ground of appeal has no merits.

Turning to the fourth ground of appeal, the appellant submitted there is no evidence to suggest the alleged properties were acquired jointly between the parties herein. He referred this court to the case of **Bibie Mauridi (supra)**

The respondent's submission suggested there was sufficient evidence on the acquired joint matrimonial assets. She further submitted she was a shopkeeper in the said shop apart from being the house wife. She thus supported the first

appellate court's decision in line with what had been stated in the cases of **Bi Hawa Mohamed Versus Ally Seif [1983] T.L.R 33** and **Hamida Abdul Versus Ramadhani Mwakaje [1988]**

Going through the court record, it has come to the attention of the court that there was credible evidence that the respondent had contributed to the acquisition of the said matrimonial assets. Apart from being a house wife she also had a shop at Chanika. It can not be said she had not contributed in the acquisition of the matrimonial properties acquired. I find the trial court did divide correctly the acquired matrimonial assets in conformity to what had been stated in the case of **Bi Hawa Mohamed Versus Ally Sefu [1983] T.L.R 32** that;

'the joint efforts and work towards the acquiring of the assets have to be construed as

embracing the domestic efforts or work of husband and wife.

From the foregoing analysis, I find no sufficient reasons to fault the decision of the first appellate court. The ground of appeal is hereby dismissed.

In totality, I find the appeal lacks merits. Consequently, the decisions of Ilala District Court in Civil Appeal No. 61 of 2016 and Ukonga Primary Court in Matrimonial Cause No. 18 of 2016 are hereby upheld. The appeal is dismissed with no order to costs due to the existed relationship between the parties.

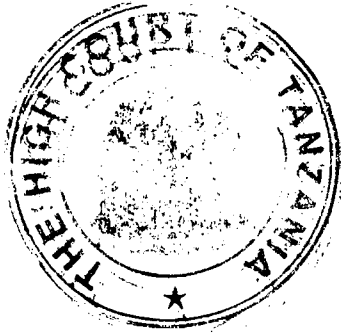
It is ordered accordingly.


B.R. MUTUNGI

JUDGE

22/6/2018

Read this day of 22/6/2018 in the presence of the Respondent and in absence of the appellant dully notified.




B.R. MUTUNGI

JUDGE

22/6/2018

Right of Appeal Explained.




B.R. MUTUNGI

JUDGE

22/6/2018